readily might have been imbedded in a blueberry and escaped the most careful scrutiny. The consistency of the decision with that previously discussed seems open to question. It is held in Massachusetts,[20] following the early law of England, still generally prevailing where common-law forms of action are preserved,[21] that action on a warranty may be in tort and neither *scienter* nor negligence on the part of the defendant need be alleged or proved. Since this is true, it is difficult to see why a plaintiff should lose his case by the superfluous allegation of negligence, if, as can hardly be doubted, his pleading contained a statement of all the facts necessary to establish an implied warranty within the principle simultaneously announced by the Massachusetts court.[22]

RIGHT OF PUBLIC SERVICE COMPANY TO ALTER RATES FIXED BY CONTRACTS. —The problem which the public utilities of the country are seeking to solve to-day is how they may legally increase their rates in spite of long term contracts with private consumers, which in many instances call for service at prices below present costs,[1] and especially do they want to know whether they may do this on their own initiative, or must they first obtain the permission of the commission or other rate regulating body.

In *V. & S. Bottle Co.* v. *Mountain Gas Co.*[2] the Supreme Court of Pennsylvania recently upheld the legal right of the defendant natural gas company to discontinue service under a low-rate, ten-year contract entered into between its predecessor and the plaintiff in October, 1913, and to require the latter to pay increased rates as per schedule filed by the defendant with the State Public Service Commission, on the ground that though said contract was valid and binding between the parties when made it became unlawful and inoperative when the public utility act[3] went into effect January 1, 1914, as it contravened the provisions of that statute against discrimination.

It is settled that the general police power of the state embraces the regulation of the service and rates of public utility enterprises for the promotion of public convenience and the general welfare,[4] and that

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[20] Farrell *v.* Manhattan Market Co., 198 Mass. 271, 274, 84 N. E. 481 (1908).

[21] Shippen *v.* Bowen, 122 U. S. 575 (1887).

[22] Ash *v.* Child's Dining Hall Co. follows Crocker *v.* Baltimore Dairy Lunch, 214 Mass. 177, 100 N. E. 1078 (1913), where it appears that the plaintiff declined to amend his declaration by adding a count in contract, and the court, making the common but erroneous assumption that implied warranty is based on promise rather than representation, said, "whether the plaintiff might have relied upon an implied warranty . . . is not now to be considered." Presumably the counsel for the plaintiff in both the Crocker and the Ash cases failed to urge upon the court the reasoning here suggested.

[1] See *Re* Marion Light & Heating Co. (Ind. Pub. Serv. Com.), P. U. R. 1918 D, 692; *Re* Oklahoma Gas & Electric Co. (Okla. Corp. Com.), P. U. R. 1918 D, 216.

[2] Pa. Sup. Ct., June 3, 1918, 13 Rate Research, 335.

[3] Pennsylvania Public Service Company Law (1913), 6 PURDON'S DIGEST, 7206; Supplement, 1915.

[4] Munn *v.* Illinois, 94 U. S. 113 (1876); Chicago, Burlington & Quincy R. Co. *v.* Iowa, 94 U. S. 155 (1876); Chicago, Burlington & Quincy R. Co. *v.* Nebraska, 170 U. S. 57, 71–72 (1898); Portland Railway, Light & Power Co. *v.* Oregon Railroad

the exercise of this power may be delegated to a municipality, commission or other administrative body.[5]

Thus the courts hold that all contracts or grants relating to public service entered into between the private person or corporation operating a public utility and the municipality or the private consumer contain from the very nature of their subject matter an implied reservation of the right of the state to lawfully exercise its police power for the general welfare, and that there is no impairment of obligations of contract within the guarantees of the state or federal constitution even though said contract is thereby rendered partially or wholly invalid.[6]

This development has wrought a fundamental change in view-point in the law of public utilities, and to-day the primary consideration is not whether the exercise of the state's regulatory power impairs the obligation of the public service contract, but whether that contract tends to abridge this power of the state.[7]

To return to our problem, the public utility proprietor must needs know when this long-term contract, which the courts agree was binding at the time made, ceases to be so, and what then become his rights or duties in the premises.

In the instant case the court held the point of cleavage to have been on the day the public service act took effect, — yet the facts showed that on two different occasions thereafter the defendant utility company filed with the commission a tariff for that class of service at the same rate provided for under said contract and charged and collected said rate until April, 1917. As pointed out by a recent writer,[8] this fact may

Commission, 229 U. S. 397 (1913); City of Woodburn *v.* Public Service Commission of Oregon, 82 Ore. 114, 161 Pac. 391 (1916); Onondaga Golf & Country Club *v.* Syracuse & S. R. Co., 96 Misc. 499, 160 N. Y. Supp. 693 (1916); Mississippi R. R. Commission *v.* Mobile & Ohio R. R. Co., 244 U. S. 388 (1917); Winfield *v.* Public Service Commission, 118 N. E. 531 (Ind.) (1918); State *ex rel.* City of Sedalia *v.* Public Service Commission, 204 S. W. 497 (Mo.) (1918).

[5] Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047 (1894). See Atlantic Coast Electric Ry. Co. *v.* Board of Public Utility Commissioners, 104 Atl. 218 (N. J.) (1918); Trustees of Saratoga Springs *v.* Saratoga Gas, Electric Light & Power Co., 191 N. Y. 123, 146, 83 N. E. 693 (1908).

[6] Kansas City Bolt & Nut Co. *v.* Kansas City Light & Power Co., 204 S. W. 1074 (Mo.) (1918); City of Fulton *v.* Public Service Commission, 204 S. W. 386 (Mo.) (1918); Collingswood Sewerage Co. *v.* Borough of Collingswood, 102 Atl. 901 (N. J.) (1918); Raymond Lumber Co. *v.* Raymond Light & Water Co., 92 Wash. 330, 159 Pac. 133, P. U. R. 1916 F, 437 (1916); McCook Irrigation & Water Power Co. *v.* Burtless, 99 Neb. 250, 152 N. W. 334 (1915); Union Dry Goods Co. *v.* Georgia Public Service Corporation, 142 Ga. 841, 83 S. E. 946, 947 (1914); Minneapolis, St. Paul, etc. Ry. Co. *v.* Menasha Wooden Ware Co., 159 Wis. 130, 150 N. W. 411, 413 (1914); Idaho Power & Light Co. *v.* Blomquist, 26 Idaho, 222, 141 Pac. 1083 (1914); *Re* Rates of the Bridge Operating Co., 3 P. S. C. R. (1st Dist. N. Y.) 226 (1912); aff'd 153 App. Div. (N. Y.) 129, 138 N. Y. Supp. 434 (1912); Portland Ry. Light & Power Co. *v.* City of Portland, 200 Fed. 890 (1912).

A fortiori the same principles govern contracts between two private companies which function successively in furnishing a public service — the one producing and the other distributing the product supplied. Oklahoma Natural Gas Co. *v.* Corporation Commission, P. U. R. 1918 D, 515 (1918).

[7] See Kansas City Bolt & Nut Co. *v.* Kansas City Light & Power Co., 204 S. W. 1074 (Mo.) (1918); City of Chicago *v.* O'Connell, 278 Ill. 591, 116 N. E. 210, P. U. R. 1917 E, 730; President & Trustees of Village of Kilbourn City *v.* Southern Wisconsin Power Co., 149 Wis. 168, 135 N. W. 499 (1912).

[8] See Ralph J. Baker, "The Binding Force of Term Contracts as Applied to Pub-

have no significance as to the real legality of said contract, for the plaintiff may have been the only consumer of this class of service, or likely to require it, and, irrespective of that, the publishing and filing of a low contract rate as a class rate does not prevent it being unlawful if it results in actual discrimination against other classes of consumers, as the court found it did here.

The most important feature of the case from the view-point of our problem is that in a suit in equity by the consumer for specific performance of the contract, and for an injunction restraining the defendant from cutting off its service in violation thereof, the court dismissed the bill and sustained the legal right and power of the utility company to take the initiative in increasing its rates and discontinuing service under the old contract without going to the Public Service Commission for leave to do so.

This case represents what may be termed the first of two general views in upholding the legal right of the public utility company, subsequent to the passing of a public service law creating a commission empowered to regulate rates, to increase on its own initiative its rates for service above the maximum fixed by contract made with a private consumer prior to said act, and admittedly valid when made.[9]

The second view is presented in several recent cases which have held

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lic Utility Rates," page 34. Paper read at Third Annual Convention of the New Jersey Utilities Association, Atlantic City, N. J., October, 1917.

[9] Onondaga Golf & Country Club *v.* Syracuse & S. R. Co.; Denver & South Platte Ry. Co. *v.* City of Englewood, Colo., 161 Pac. 151, P. U. R. 1916 E, 134 (1916); Mullen & Co. *v.* Denver & Rio Grande R. Co. (Colorado Public Utilities Commission), P. U. R. 1916 E, 128; Minneapolis, St. Paul & S. S. Ry. Co. *v.* Menasha Wooden Ware Co., 159 Wis. 130, 150 N. W. 411 (1914); Wolverton *v.* Mountain States Telephone & Telegraph Co., 58 Colo. 58, 142 Pac. 165 (1914); Alpena Electric Light Co. *v.* Kline, 180 Mich. 279, 146 N. W. 652 (1914); State *v.* Martyn, 82 Neb. 225, 117 N. W. 719 (1908).

It has been held in New Jersey that the Public Utilities Act permits the utility to file a new schedule of rates without first obtaining permission of the Board.

Re Public Service Electric Co. (New Jersey Board of Public Utility Commissioners), P. U. R. 1918 E, 898 (1918).

And in New York a very recent case holds the Public Service Commissions Law (CONSOL. LAWS, c. 48) places no restriction on the right of gas companies to increase rates and make the increase effective prior to the time when the Public Service Commission shall determine whether the proposed increase is just and reasonable. Pub. Service Commission, Second District, *v.* Iroquois Natural Gas Co., 171 N. Y. Supp. 379 (1918).

Under the Illinois Public Utilities Act the same decision has been reached, but restricted to the original schedules of rates only. State Public Utilities Commission *v.* Chicago & West Towns Ry. Co., 275 Ill. 555, 114 N. E. 325 (1916).

Cases to the same effect under the Interstate Commerce Act, as to contracts made before the act and valid when made: Southern Wire Co. *v.* St. Louis Bridge & Tunnel Co., 38 Mo. App. 191 (1889); Louisville & Nashville R. Co. *v.* Mottley, 219 U. S. 467 (1911); Dorr *v.* Chesapeake & Ohio Ry. Co., 78 W. Va. 150, 88 S. E. 666 (1916); Carter Planing Mill Co. *v.* New Orleans R. Co., 112 Miss. 148, 72 So. 884 (1916).

In the following cases the customers of the utility companies were subjected to penalties for accepting service at rates fixed by contract made subsequent to the passage of the Interstate Commerce Act, and valid when made, but rendered invalid under the act by the public utilities raising the rates for like service to others in the manner provided by law: New York, New Haven & Hartford R. Co. *v.* Interstate Commerce Commission, 200 U. S. 361 (1906); Armour Packing Co. *v.* United States, 209 U. S. 56 (1908).

that the public service acts of their respective jurisdictions worked no change in existing rates; that, therefore, rates fixed by a previously valid contract remain binding on the parties and do not become unlawful unless and until the State Commission duly determines them to be so, and that the utility company accordingly has no legal right to discontinue said contract on its own initiative prior to such decision.[10]

In some states[11] this point is expressly provided for in the public service statute denying to the public utility the right to itself increase the maximum rates fixed in any contract or grant under which it was operating at the time the act took effect during the term of said contract or grant.

These statutes have been construed to in no way limit the power of the commission to increase said maximum rates during the life of the contract or grant, nor to deprive the utility of the right to apply to the commission for such an increase before the expiration of said term.[12] It has been held that a statute which denies the utility an opportunity to apply for an alteration in rates is unconstitutional.[13]

It is submitted that in the absence of such statutory provisions the first of the two views discussed is more in accord with the fundamental principles of the law of public utilities, and that the same view should be taken of term contracts made subsequent to the passage of the public service law, or other regulating statute, unless the provisions of the act do not permit of that construction.[14]

A fortiori the public service commission, or similar body, may alter rates fixed by long term contract during said term, whether such contract was made before or after the empowering act,[15] unless said act is con-

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[10] Manitowoc *v.* Manitowoc & Northern Traction Co., 145 Wis. 13, 28, 129 N. W. 925 (1911); Sultan Timber Co. *v.* Great Northern R. Co., 58 Wash. 604, 109 Pac. 320 (1910), (Washington statute in force then did not expressly except existing contract rates from the prohibition against discrimination).

A case going much further and holding that even the commission did not have power to increase rates in spite of such a contract is Public Service Electric Co. *v.* Board of Public Utility Commissioners and City of Plainfield, 88 N. J. L. 603, 96 Atl. 1013 (1916).

[11] Washington Public Service Commission Law, 1911, § 34 (GEN. STAT. 1915), §§ 8626–34, relating to gas, electric and water companies, but there is no corresponding provision as to common carriers (*semble*, §§ 20–21) GEN. STAT., §§ 8626–20, 21. Indiana Public Service Act, 1913, § 7 (BURNS' ANN. STAT. 1914), ch. 124 A, §§ 10052 g–7); Illinois Public Utilities Act, § 36 (HURD'S REV. STAT., 1915–16, c. 111 *a*, § 36); Utah Public Utilities Commission Act, Laws of Utah, 1917, ch. 47, art. 3, § 5.

[12] Raymond Lumber Co. *v.* Raymond Light & Water Co., 92 Wash. 330, 159 Pac. 133, P. U. R. 1916 F, 437 (1916); Winfield *v.* Public Service Commission, 118 N. E. 531, 537 (Ind.) (1918); State Public Utilities Commission *v.* Chicago, Peoria & St. Louis Railroad Co., 118 N. E. 427 (Ill.) (1917); Salt Lake City *v.* Utah Light & Traction Co., 173 Pac. 556 (Utah), P. U. R. 1918 F, 377.

[13] Trustees of Saratoga Springs *v.* Saratoga Gas, Electric Light & Power Co., 191 N. Y. 123, 83 N. E. 693 (1908).

[14] Osborne *v.* San Diego Land & Town Co., 178 U. S. 22 (1900), affirming Lanning *v.* Osborne, 76 Fed. 319 (1896); President & Trustees of Village of Kilbourn City *v.* Southern Wisconsin Power Co., 149 Wis. 168, 135 N. W. 499 (1912); Birmingham Waterworks Co. *v.* Brown, 67 So. 613 (Ala.) (1914).

[15] Atlantic Coast Electric Ry. Co. *v.* Board of Public Utility Comm'rs, *supra;* Salt Lake City *v.* Utah Light & Traction Co., *supra;* Whitcomb *v.* Duquesne Light Co. (Pa. Pub. Serv. Com. 1916), P. U. R. 1917 B, 979; City of Woodburn *v.* Public Service Commission, *supra;* Raymond Lumber Co. *v.* Raymond Light & Water Co., *supra;*

strued to be prospective only as to that particular type of contract;[16] and increases made in rates by the public utility pursuant to the determination of the commission as to what is a just and reasonable rate become effective when filed and apply alike to contract and non-contract consumers.[17]

To determine when the contract rate becomes unlawful, we must consider the situation in states which have not yet adopted commission regulation of public service rates, and in those jurisdictions where certain utilities are not governed so strictly in this respect by the public utilities act in force.

The basic principles of the law of public utilities require that rates must be just and reasonable in order to provide a fair return on the investment,[18] and to enable the utility to maintain a safe, adequate and efficient service. Therefore it seems clear that whenever the rates for the public service, though fixed by long termed contracts between the utility and its customers, become so low as to be unjust and unreasonable and to directly tend to disable the company from performing its public service obligations, as defined above, said rates are *ipso facto* unlawful and void, and it is the legal duty, not the privilege, of the public utility enterprise to discontinue performance of said contracts and to increase

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Pinney & Boyle Co. *v.* Los Angeles Gas & Electric Corporation, 168 Cal. 12, 141 Pac. 620 (1914); Portland Railway Light & Power Co. *v.* City of Portland, *supra.*

For cases distinctly upholding power of commission, or other lawfully authorized administrative body, to reduce rates below those fixed by contract, see Rogers Park Water Co. *v.* Fergus, 180 U. S. 624 (1901); City of Chillicothe *v.* Logan Natural Gas & Fuel Co., 8 Ohio N. P. 88 (1901).

Recent decisions to effect that power to establish just and reasonable rates includes power to increase them, in excess of the maximum fixed by contract or agreement. Collingswood Sewerage Co. *v.* Borough of Collingswood, 102 Atl. 901 (N. J.); P. U. R. 1918 C, 261. People *ex rel.* New York & North Shore Traction Co. *v.* Public Service Commission of New York, Second District, 175 App. Div. 869, 162 N. Y. Supp. 405; P. U. R. 1917 B, 957 (1916). See 31 HARV. L. REV. 1168.

And even though the contract rate was approved by the commission when made: The Golden Cycle Mining & Reduction Co. *v.* The Colorado Springs Light, Heat and Power Co. (Col. Pub. Util. Com.), 13 Rate Research, 131 (1918); *Re* Public Service Electric Co., P. U. R. 1918 E, 898.

The unique case of a public utility company objecting that a minimum rate was too rigid was presented in Economic Gas Co. *v.* City of Los Angeles, 168 Cal. 448, 143 Pac. 717 (1914).

The so-called beneficiary right of the consumer in public service rate-contracts between other parties which tend to redound to his benefit has been discussed in some recent cases: Borough of North Wildwood *v.* Board of Public Utility Commissioners, 88 N. J. L. 81, 95 Atl. 749; P. U. R. 1916 B, 77 (1915). See Collingswood Sewerage Co. *v.* Borough of Collingswood, *supra.* *Cf.* Natick-Framingham-Marlboro Gas Petition (Mass. B'd Gas & Electric Light Comm'rs, May, 1918), 13 Rate Research, 200.

[16] Public Service Electric Co. *v.* Board of Public Utility Commissioners and City of Plainfield, 88 N. J. L. 603, 96 Atl. 1013 (1916). See Salt Lake City *v.* Utah Light & Traction Co., *supra.*

[17] *Re* Public Service Electric Co., *supra;* The Golden Cycle Mining & Reduction Co. *v.* The Colorado Springs Light, Heat & Power Co., *supra.*

[18] Smyth *v.* Ames, 169 U. S. 466 (1897); Knoxville *v.* Knoxville Water Co., 212 U. S. 1 (1908); Willcox *v.* Consolidated Gas Co., 212 U. S. 19 (1908); Cedar Rapids Gas Co. *v.* Cedar Rapids, 223 U. S. 655 (1912), affirming 144 Ia. 426 (1909); Mississippi Railroad Commission *v.* Mobile & Ohio R. Co., 244 U. S. 388; P. U. R. 1917 E, 791; Darnell *v.* Edwards *et al.* (Miss. R. Comm.), 244 U. S. 564 (1917). See State *ex rel.* Webster *v.* Superior Court, 67 Wash. 37, 120 Pac. 861 (1915).

its rates to the point that they are again just and reasonable.[19] Of course, the converse is true as to contract rates which changing conditions may render too high and unjust and unreasonable to the public.[20] These principles apply equally to contracts which for any reason become discriminatory.[21] As stated in a recent case the public service acts have not changed the law in this respect.[22]

Obviously, a contract the performance of which thus conflicts with the legal duty owed by the utility enterprise to the public is unlawful and outside the protection of the contract clause of the State or Federal Constitution.

Quære: — Would it not be desirable, in view of the modern public service acts empowering the commissions to restrict competition, to treat all long term contracts fixing rates for public service as void *ab initio*, because inherently tending to violate the basic policy of regulation of public utility rates as herein explained.[23]

RECENT CASES

ADMINISTRATION — RES ADJUDICATA — EFFECT OF DECREE OF PROBATE COURT ON INTESTATE REALTY. — An intestate decedent, domiciled in Illinois with all his real and personal property in that state, left a son and several brothers and sisters all domiciled in Kansas. The Illinois county court, with probate jurisdiction over his estate, decreed after service by publication on the non-residents that the brothers and sisters were the heirs. The personal property was distributed accordingly. The son did not appear. He now brings a bill in equity in the Illinois Circuit Court to obtain the real estate as sole heir. *Held*, he is not estopped by the probate adjudication. *Mosier* v. *Osborn*, 119 N. E. 924 (Ill.).

At common law realty passed directly to the heir. But in Illinois by statute realty is treated in the same manner as personalty for the law of descent of real property. See 1917, HURD'S REV. STAT. ILL., c. 39, § 1. The Illinois Constitution also says that the county court, having probate juris-

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[19] Oklahoma Natural Gas Co. *v.* Corporation Commission of Oklahoma (Okla.); P. U. R. 1918 D, 515 (1918); Northampton, Easton & Washington Traction Co. *v.* Board of Public Utility Comm'rs, 102 Atl. 930 (N. J.) (1918); State Public Utilities Commission *v.* Chicago & West Towns Ry. Co., 275 Ill. 555; 114 N. E. 325 (1916); City of Louisiana *v.* Louisiana Water Co. (Mo. Pub. Serv. Comm.) P. U. R. 1918 B, 774.

For these principles applied to a municipal franchise see Atlantic Coast Electric Ry. Co. *v.* Board of Public Utility Comm'rs, 104 Atl. 218, 220 (N. J.) (1918).

[20] Whitcomb *v.* Duquesne Light Co. (Pa. Pub. Serv. Com. 1916), P. U. R. 1917 B, 979.

[21] State *ex rel.* American Union Telegraph Co. *v.* Bell Telephone Co. of Missouri, 22 ALBANY LAW JOURNAL, 363 (St. Louis Cir. Ct.) (1880); The Inter-Ocean Publishing Co. *v.* The Associated Press, 184 Ill. 438, 450; 56 N. E. 822 (1900); Birmingham Waterworks Co. *v.* Brown, 191 Ala. 475, 67 So. 613 (1914).

[22] See Atlantic Coast Electric Ry. Co. *v.* Board of Public Utility Comm'rs, *supra*.

[23] See Manitowoc *v.* Manitowoc & Northern Traction Co., 145 Wis. 13, 129 N. W. 925 (1911); Wolverton *v.* Mountain States Telephone & Telegraph Co., 58 Colo. 58, 142 Pac. 165 (1914); Atlantic Coast Electric Ry. Co. *v.* Board of Public Utility Comm'rs, *supra*.